BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MANUEL ULTRERAS	)	
Claimant	)	
VS.	)	
	)	Docket No. 193,272
EXCEL CORPORATION	)	
Respondent	)	
Self-Insured	)	

ORDER

Claimant appeals from an Award entered by Special Administrative Law Judge William F. Morrissey on December 26, 1995. The Appeals Board heard oral argument on February 6, 1996.

APPEARANCES

Claimant appeared by his attorney, Kelly W. Johnston of Wichita, Kansas. Respondent, a self-insured, appeared by its attorney, D. Shane Bangerter of Dodge City, Kansas.

RECORD AND STIPULATIONS

The Appeals Board has reviewed the record listed in the Award. The Appeals Board has also adopted the stipulations listed in the Award.

ISSUES

The sole issue to be considered on appeal is the nature and extent of claimant's disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments of the parties the Appeals Board finds claimant sustained an 18.5 percent permanent partial general disability and the Award of the Special Administrative Law Judge should be affirmed.

The central question in this case is whether claimant's award should be limited to functional impairment or should, instead, be based upon a higher work disability. The answer to the question depends upon an assessment of the claimant's efforts in the post-injury employment offered by respondent.

Claimant began working for respondent in 1989 and for five years operated a banana bar used to pull and remove hide off of slaughtered cattle. He developed pain in his shoulders and elbows, later diagnosed by the treating physician, Dr. Pedro A. Murati, as left rotator cuff tear, right rotator cuff tendinitis and bilateral ulnar cubital syndrome. Claimant declined recommended shoulder surgery.

After a period of conservative treatment respondent offered claimant the opportunity to change jobs. Claimant was allowed to tour the plant and view various jobs. Although not permitted to bump into the first job he chose, claimant ultimately chose a position as a liver wrapper. This was a job Dr. Murati concluded claimant could perform and which claimant, himself, felt he could perform. Claimant worked in the liver wrapper position for two weeks and was then terminated because he did not satisfy qualifying standards which required he be able to wrap one tub of livers every seven minutes.

Respondent argues and the Special Administrative Law Judge found that claimant's award should be limited to functional impairment on the basis of the principle stated in Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), rev. denied 257 Kan. 1091 (1995). In that case the Kansas Court of Appeals construed the language from K.S.A. 1988 Supp. 44-510e(a) which created a presumption of no work disability when a worker engaged in work after his injury at a wage comparable to his pre-injury wage. The Court there held that the presumption applies in circumstances where an employee refuses to even attempt employment which the evidence shows he or she could perform. The presumption construed in the Foulk case was replaced effective July 1, 1993 by language stating that the award is absolutely limited in the case where the employee, after his injury, engages in employment at a wage which is 90 percent or more of his average weekly wage. As suggested in Wollenberg v. Marley Cooling Tower, Docket No. 184,428 (Sept. 1995), the Appeals Board considers the principles of Foulk to be equally applicable to the modified standards that became effective July 1, 1993.

The facts in the present case obviously differ from those in the Foulk case. In Foulk the claimant refused to attempt offered post-injury employment. In the present case, claimant did perform the job for two weeks, but was terminated when he failed to qualify. The respondent asserts that the principles of Foulk, nevertheless, apply because the evidence establishes that claimant failed to make a good-faith effort in the offered post-injury work. Claimant, on the other hand, asserts that the principles of Foulk should not be extended to cases where the claimant does attempt the post-injury employment. Claimant also argues that he failed to qualify, in part, because of difficulties resulting from his injury.

Claimant has the burden to establish the conditions upon which claimant's rights depend. K.S.A. 44-501. As it relates to nature and extent of disability, claimant's burden may be met by establishing the extent of the functional impairment or establishing work disability through medical restrictions and proof of their effect on claimant's ability to perform tasks performed in previous employment as well as the amount of claimant's post-injury wage.

Provisions of K.S.A. 44-510e limiting the award to functional impairment based upon post-injury wage is in the nature of a defense. The burden should be on the respondent. This burden may be met by establishing either the claimant is, in fact, engaging in employment at a wage equal to 90 percent of the pre-injury average weekly wage or, in the alternative, that he is offered such employment that he could perform but claimant refused to even attempt such employment. The Appeals Board also believes that, with the principles announced in Foulk, the burden may be met by establishing that the claimant did not make a good-faith effort to perform the duties of the post-injury work which the evidence establishes he or she could perform.

The Appeals Board finds respondent has met its burden, in this case, by showing that claimant failed to make a good-faith effort to perform the duties of the position offered by respondent, a position which paid a wage of more than 90 percent of the pre-injury wage. The work of a liver wrapper involved tearing off a sheet of cellophane, placing a piece of liver on the cellophane, wrapping the liver and placing it aside to be boxed. In order to qualify for this position on a permanent basis claimant was expected to pack one tub of liver every seven minutes. Claimant did not come close to meeting that qualification and the fastest he was ever timed was twelve minutes. On other occasions his time was even longer. Two supervisors observed and testified regarding claimant's work. Although he performed the wrapping satisfactorily, he never approached the minimum standards for speed. He washed himself between each tub while most employees waited much longer. He stood looking around, rather than working. Dr. Murati testified, from his observation of the position and claimant's injuries, claimant's injuries would not prevent him from performing the duties of a liver wrapper.

Claimant was also examined by Dr. Rawcliffe who gave slightly varying restrictions. He did not, however, give testimony indicating claimant could not perform the duties. Claimant, himself, testified he was terminated because he could not do the job quickly enough. He gave very little explanation about why, referring in part to pain in his hands. On balance, taking into consideration the record as a whole, the Appeals Board concludes respondent has established claimant failed to make a good-faith effort to perform the post-injury job which would have paid the same wage as the pre-injury job. The Appeals Board, therefore, finds and concludes that the Award should be limited to functional impairment.

Dr. Murati rated claimant's functional impairment at 20 percent permanent partial impairment. Dr. Rawcliffe rated it at 17 percent general body. Giving equal weight to both opinions, the Appeals Board finds claimant sustained an 18.5 percent permanent partial impairment.

Finally, after oral argument claimant's counsel submitted a supplemental brief addressing issues relating to the recent Court of Appeals decision in Boucher v. Peerless Products, Docket No. 74,158 (1996). In that case the Court of Appeals ruled that where the injury did not disable the claimant for at least one week from earning full wages, the award should be for medical only. See K.S.A. 44-501(c). Claimant argues he was disabled from earning full wages for more than one week. The Appeals Board does not, however, consider this issue to be before the Board. Respondent did not raise it either before the Special Administrative Law Judge or before the Board. This issue will not, therefore, be considered on Appeal. Scammahorn v. Gibraltar Savings & Loan Assn., 197 Kan. 410, 416 P.2d 771 (1966).

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Special Administrative Law Judge William F. Morrissey dated December 26, 1995 should be, and is hereby, affirmed.

AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Manuel Ultreras, and against the respondent, Excel Corporation, a self-insured, for an accidental injury which occurred March 1, 1994, and based upon an average weekly wage of $442.87, for 76.78 weeks of permanent partial compensation at the rate of $295.26 per week or $22,670.06, for a 18.5% permanent partial general body impairment of function.

As of March 29, 1996 there is due and owing claimant 76.78 weeks of permanent partial disability compensation at the rate of $295.26 per week in the sum of $22,670.06, less any amounts previously paid.

The Appeals Board also affirms and adopts all other orders of the Special Administrative Law Judge including those related to future medical expense, fund liability, attorney fee contract and fees necessary to defray costs of administration of the Workers Compensation Act.

IT IS SO ORDERED.

Dated this ____ day of March 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Kelly W. Johnston, Wichita, Kansas
D. Shane Bangerter, Dodge City, Kansas
William F. Morrissey, Special Administrative Law Judge
Philip S. Harness, Director